JD–20–04
Timonium, MD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TRANE, AN OPERATING DIVISION
OF AMERICAN STANDARD, INC.
EMPLOYER

and 5-RC-15605

LOCAL UNION #486,
PLUMBERS AND STEAMFITTERS
OF BALTIMORE, MARYLAND
PETITIONER

Christopher R. Coxson, Esq.,
for the Regional Director, Region 5.
Richard S. Cleary, Esq., and George D. Adams, Esq.,
of Louisville, Kentucky, on behalf of the Employer.
Anton G. Hajjar, Esq., and Daniel B. Smith, Esq.,
of Washington, D.C. on behalf of the Petitioner.

ADMINISTRATIVE LAW JUDGE DECISION AND
RECOMMENDATIONS ON CHALLENGES AND OBJECTIONS

Eric M. Fine, Administrative Law Judge. I heard this matter on January 27, 2004. Based on the evidence as a whole, including my observation of the demeanor of the witnesses,[1] I make the following findings and conclusions.

The petition for election in this matter was filed by the Union on August 8, 2003.[2] Pursuant to a Stipulated Election Agreement, approved by the Regional Director on August 15, an election was conducted on September 18, in the following unit:

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[1] The Union called two witnesses, current employee John Boyer and former employee Billy Joe Perdue, Jr. Considering their demeanor, I find each testified in a straight forward and credible fashion. In reaching this conclusion, I have considered that Perdue, a former employee, left the Employer's employ following a disciplinary incident. Nevertheless, he did not appear hostile to the Employer and he testified with specificity to the extent his recollection would permit. Moreover, much of Perdue's testimony was confirmed by admissions of the Employer's witnesses. The Employer called Victor Creager and James Corns, Sr. to testify and each were employed there as salaried managers at the time of their testimony. I found their testimony to be somewhat contradictory and internally inconsistent. Moreover, considering their demeanor, I found them to be less forthcoming than they could have been. To the extent there were conflicts, I have credited the Union's witnesses over those of the Employer unless otherwise stated. However, my failure to credit certain aspects of a witness's testimony does not mean that I have rejected all of their testimony. See, *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950).

[2] All dates are in 2003, unless otherwise stated.

> All full-time and regular part-time HVAC journeymen and apprentice service technicians[3] employed by the Employer at its Timonium, Maryland facility; but excluding all other employees, professional employees, office clerical employees, guards, and supervisors as defined in the Act.

During the election eleven ballots were cast for the Union, eight were cast against it, and there were three challenged ballots, which were sufficient in number to affect the results of the election. The Union and the Employer each filed timely objections to the election.

On December 31, the Regional Director issued a Report on Challenges and Objections. As reflected therein, the Union challenged the ballot of John Boyer, asserting he is a truck driver, a classification not contained in the unit. The Union challenged the ballots of Theodore Liebau and Paul Savage asserting they are supervisors within the meaning of Section 2(11) of the Act.[4] The parties also litigated at the hearing Employer objection 1(a), which reads:

> The Union intimidated and coerced employees into voting for it by:
> (a) Congregating in the Company's parking lot before and after each management/employee meeting during the post-petition, pre-election period.[5]

Findings of Fact and Discussion

The Employer manufactures, installs, and services commercial and residential HVAC equipment throughout the United States and abroad. The stipulated collective bargaining unit in the present case relates to the Employer's Timonium, Maryland facility (the Employer's facility), and involves employees working in the service department out of that facility. James Corns, Sr., was the service manager at the Employer's facility from 1999 until March 10, 2003, when he was replaced by Victor Creager. When Creager replaced Corns as service manager, Corns became the director of safety and training. As such, Corns holds monthly safety meetings that are open to all employees at the Employer's facility as relevant to them. These meetings have been attended by the bargaining unit employees, building automation service technicians, office staff, as well as by the individuals whose ballots have been challenged herein.

Corns and Creager are salaried and do not wear company uniforms. Creager testified he receives certain compensation packages not available to the hourly paid employees. Liebau, Savage, Boyer, and the HVAC service technicians are hourly paid, and they all wear the same company uniform. Creager testified he thought Liebau and Savage earn more than the HVAC

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[3] The HVAC journeymen and apprentice service technicians will be referred to collectively herein as the HVAC service technicians.

[4] It should be mentioned that both the Union and the Employer ask that I draw an adverse inference because of the other side's failure to call Liebau and Savage to testify. I deny these requests. While it is the Union's burden to establish the supervisory status of each of these individuals in this proceeding, neither witness is aligned with the Union, which is seeking to exclude them from the unit. While both individuals were in the Employer's employ at the time of the hearing, the Employer denies their alleged supervisory status. In such circumstances, I do not find that an adverse inference is warranted by either party's failure to call Liebau or Savage to testify, nor do I find that an adverse inference is necessary to resolve the issues in this case.

[5] The Regional Director set three objections for hearing, two of which were filed by the Employer, and one of which was filed by the Union. However, Employer objection 1(c) and Union objection 3 were withdrawn at the hearing and not litigated.

service technicians and that Savage makes a little less than Liebau. Creager testified wages are based on seniority and merit. Within the stipulated bargaining unit there are a certain employees accorded the title of senior technician, who voted in the election without challenge. Creager testified the senior technicians mentor less experienced technicians. Creager testified there were around eight senior HVAC service technicians employed at the Employer's facility. However, Creager included Liebau and Savage in this count.

Liebau and Savage possess Maryland state HVAC journeymen licenses, Boyer does not. Liebau and Savage are each issued a leased van by the Employer, as are the HVAC service technicians, and all of those issued these vans can take them home over night. Boyer has not been issued a company van. Rather, Boyer drives a large flat bed truck, which is used to haul heavy equipment or materials to and from jobsites. Boyer has a DOT license, which allows him to drive this vehicle out of state. Boyer does not drive this vehicle home over night. Liebau, Savage, and Boyer fill out time sheets to bill their hours as relevant to customers, as do the HVAC service technicians.

A. The challenged ballots of Boyer, Savage, and Liebau

1. Boyer

Boyer testified he has been working for the Employer for around 3 years, and Corns testified Boyer's responsibilities have not changed over the course of his employment. Corns testified he hired Boyer to the position of "shop HVAC technician, " and that Boyer still held that position at the time of the hearing. However, in the Employer's organization chart issued in September 2002, Boyer is listed as "Technician TMH Facilities/Fleet Management," and in Employer organization charts dated December 9, 2002, March 7, May 1, and July 1, 2003, Boyer is listed as "Materials Coordinator." The bargaining unit employees are listed on the Employer's charts as members of one of two teams of "HVAC Field Technicians" reporting to an area manager in the initial chart, and in the later charts to an area service manager (ASM). Boyer is not on either of these teams in the charts, and he listed separately as reporting directly to either Corns or Creager when Creager replaced Corns.[6]

Boyer testified he works for the service department and for administration. In administration, Boyer performs light maintenance at the Employer's facility such as changing light bulbs and fixing the toilet. Boyer keeps the warehouse in order and cleans tools, rigging and other items. Boyer helps Corns with the maintenance and repair of the Employer's vehicles. Boyer keeps track of safety materials and he determines if tools used by the HVAC service technicians should be repaired or replaced. Creager or Corns have to approve replacing equipment. Boyer repairs tanks, or has one of the HVAC service technicians come in

[6] I do not find Creager's explanation of why Boyer was given the job title materials coordinator on the organization charts to be convincing. Creager testified "it kind of catches me off guard, because I don't even really realize this, myself, because I might have multiple organizational charts, because I'm looking at growing the business, so I might envision something. I would see myself a year down the road, five months down the road, five years down the road, and make different charts. Far as this, this chart here, showing John Boyer just as a materials coordinator, his role is bigger than just that." Yet, Boyer was first listed as a materials coordinator on the Employer's December 9, 2002, organization chart, and Creager did not begin working at the Employer's facility until March 10, 2003. Corns was service manager at the time the December 9, 2002, organization chart was created. When pressed why Boyer was given the job title on the charts, Corns testified, "I don't know why."

to do it. While at the warehouse, Boyer pumps waste oil into drums for disposal. Boyer repairs rigging and stands, and makes sure the tools are in the tool crib. Boyer loads and unloads equipment from his truck at the warehouse.

Boyer drives a large truck for hauling rigging, compressors, large motors, or other items back and forth to the jobsites. Boyer testified he assists HVAC service technicians at the jobsites in that on occasion he helps them remove or install large pieces of equipment that he has delivered to the site, or has to take back to the shop. Boyer estimated that he goes to the jobsites around 3 days a week and that around 2 of those days, he helps the HVAC service technicians install or remove equipment. Boyer has also helped the HVAC service technicians change coils in the field. He testified that when performing this function he is basically helping out in a laborer's capacity. Boyer has also punched chiller tubes at the jobsites, which is work the HVAC service technicians perform. Boyer testified if a crane is at the site, he will stay with the crane operator to help place a motor or compressor in a sling, which the crane picks up to put on the roof or bring the old one down. The crane operators are usually employees of outside contractors. Boyer testified he works around 42 to 44 hours a week and that on average he spends 8 hours in the warehouse, 15 hours driving the truck, leaving the remaining hours as time spent at the jobsites.[7] Boyer testified Savage, the coordinator in the service department, Creager, or office manager Trisha Amig refer him out to the jobsites.

Boyer testified that you must apply with the state of Maryland for an HVAC apprentice license to work as an HVAC apprentice. Boyer does not have this license, and has never applied for one. Boyer testified the Employer's apprentices are mostly helpers at the jobsites where the HVAC journeymen service technicians train them. The apprentices receive most of their training in the field by working with the journeyman. Boyer testified sometimes the journeymen HVAC service technicians will show him something new, but it is not a regular part of Boyer's job to receive this training.[8]

Corns testified the Employer employed three HVAC apprentice service technicians in 2003. The parties stipulated the three apprentices are John Price, Dan Kurmiller, and Jason Smith and that each possesses a Maryland state HVAC apprentice license. Corns testified the Employer's HVAC apprentices start out at a pay rate of around $2 an hour more than Boyer was earning at the time of the hearing, although Boyer had been working for the Employer for over 3 years. Corns testified the HVAC journeymen service technicians can earn as much as $10 an hour more than the apprentices. Corns testified the apprentices are in trade school, and there is no set time for an apprentice to become a journeyman. Their rise to journeyman status depends on their abilities and when they finish trade school. Corns testified it takes 5 to 7 years to become a good mechanic in the heavy industry, and the apprentice's pay goes up in increments over time. Corns testified the apprentices are evaluated in the field, and are moved up in pay by merit, and the schools they attend. Corns testified the apprentices receive on the job training working their way towards journeyman status.

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[7] Boyer's duties change depending on the season and the summer is a busy time period.

[8] Boyer testified HVAC service technicians perform Boyer's work while he is on vacation, or otherwise unavailable. Each of the HVAC service technicians have driven the Boyer's flat bed truck at least once, and on occasion Boyer uses a spare van used by the technicians, rather than the flat bed truck to run parts to the jobsites. Boyer estimated an HVAC service technician could drive the flat bed truck once every two months, or as little as once every six months. Boyer testified, during slow periods, HVAC service technicians perform work in the shop such as pumping oil, or straightening out rigging.

When asked if Boyer is an apprentice, Corns testified Boyer's job is shop technician. Moreover, the Employer's counsel made the following representation concerning Boyer at the hearing:

> MR. CLEARY: I don't think anybody-- if I can just say one thing, I don't think anybody has said that Boyer, anybody today, has testified that Boyer is an apprentice. I mean, in fact, there's a stipulation, I believe—
>
> * * *
>
> MR. CLEARY: -- that he is not an apprentice. So I think this entire line of questioning is irrelevant and is pushing us towards the 7:00 hour unnecessarily.

Perdue testified he is an HVAC journeyman service technician licensed by the state of Maryland. While working for the Employer, Perdue performed repairs on and diagnosis of problems with commercial air conditioning systems. The repairs run from minor to major including removing and replacing defective components, such as bearings, loaders, propellers, and fan blades in air conditioning machinery. Perdue testified he has also set up rigging in the field, and has flushed tubes. Perdue has changed coils as a journeyman, although not while working for the Employer. Perdue testified part of his job was to make service calls to respond to customer problems. During a service call, the technician diagnoses problems with equipment, and attempts to repair it. Perdue was given a job description entitled "HVAC Field Technician" while he worked for the Employer. The job description provides in the initial five items that the HVAC field technicians: are responsible for servicing products and equipment on assigned projects and ensuring customer satisfaction; use a variety of hand-tools, follow blue prints or engineering specifications to diagnose and repair units; identify, analyze, diagnose, and repair systems and products at the customer's location; perform preventative maintenance, site surveys, replacement, and modifications as needed or requested by customers; prepare for on-site installation and repairs by examining building layout, anticipating difficulties, gathering materials and coordinating on-site work, as necessary.

a. Analysis

In *Los Angeles Water & Power Employees Assn.,* 340 NLRB No. 146, slip op. at 4, (2003), the Board set forth the following principles:

> The Board applies the three-part test set forth in *Caesars Tahoe,* 337 NLRB 1096 (2002), to determine whether a challenged voter properly is included in the stipulated bargaining unit. Pursuant to this test:
>
> > the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.
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> * * *
>
> In addition, where the stipulation specifically enumerates the job classifications that are included in the unit, the classification at issue is not among them, "and there is an exclusion for 'all other employees,' the stipulation will be read to clearly exclude that classification." *Bell Convalescent Home,* 337 NLRB 191 (citing *National Public Radio, Inc.,* 328 NLRB 75 (1999), and *Prudential Insurance Co.,* 246 NLRB 547 (1979)).

The stipulated unit at issue here is the following:

> All full-time and regular part-time HVAC journeymen and apprentice service technicians employed by the Employer at its Timonium, Maryland facility; but excluding all other employees, professional employees, office clerical employees, guards, and supervisors as defined in the Act.

The Union argues in its brief the stipulation is clear and unambiguous and it is limited to "HVAC journeymen and apprentice service technicians" excluding all other employees. It is argued that, at the hearing, the Employer's counsel admitted Boyer is not an apprentice, and Corns testified Boyer is not an apprentice. It is asserted Boyer is not a journeyman technician and therefore there is a clear intent to exclude him in the agreed on unit description. The Employer argues the stipulated election agreement is ambiguous in that the terms "HVAC journeymen and apprentice service technicians" are arguably subject to more than one interpretation as the terms are not defined in the stipulation and they are not job classifications used by the Employer. The Employer cites the various titles given to the bargaining unit employees at the hearing as part of its contention that the unit description is ambiguous.

I find in agreement with the Union that the stipulation is unambiguous on its face in that it is limited to "HVAC journeymen and apprentice service technicians," and "excluding all other employees…". There is no contention that Boyer is a journeyman technician. The record reveals a journeyman is licensed by the state, requires certain skill sets, which according to Corns usually require 5 to 7 years to obtain through on the job training and attendance at trade school. Moreover, the Employer 's counsel agreed on the record that Boyer was not an apprentice. Corns also testified the Employer hired three apprentices and Boyer was not one of them. Boyer himself thought he had to apply for a state apprenticeship license to be an apprentice, and he testified he had not applied for such a license, while the parties stipulated the three apprentices had applied for and received the license. Corns testified Boyer was paid less than the apprentices, and that the apprentices, unlike Boyer, were receiving on the job training to become a journeymen technicians. Accordingly, I find the stipulation agreement clearly enumerates the positions included in the bargaining unit, while excluding all other employees. Boyer's classification was not included in positions within the unit description, and therefore he should be excluded from the agreed upon unit. See, *Los Angeles Water & Power Employees Assn.,* supra.[9]

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[9] Maryland State Code Title 9(A), West's Annotated Code of Maryland, (2004), relating to "Heating, Ventilation, Air-Conditioning, and Refrigerator Contractors," provides in the following Sections that:

> 101(b) Board means the State Board of Heating, Ventilation, Air-Conditioning, and Refrigeration Contractors;
>
> 101(j) Journeyman license means a license issued by the Board to provide heating, ventilation, air-conditioning, and refrigeration services while under the direction and control of a licensed contractor.
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> 101(m) Licensed apprentice means an individual who is licensed by the Board to assist in providing heating, ventilation, air-conditioning or refrigeration services while: (1) under the direction and control of a licensed contractor; and (2) in training to become a journeyman.
>
> 301 Except as otherwise provided in this title, an individual shall be licensed by the Board before the individual provides or assists in providing heating, ventilation, air-conditioning, or refrigeration services in the State.
>
> 302 An applicant for a journeyman license shall: (1) have held, for a period of at least 3

Continued

Moreover, even assuming that the language in the stipulation agreement is found to be ambiguous, I find based on extrinsic evidence it was the parties intent limit the unit to HVAC journeymen and apprentice service technicians, and thereby to exclude Boyer from the unit. On the Excelsior list for the election compiled by the Employer, under the heading Department, the Employer lists Boyer, as well as the other 22 named individuals, as an "HVAC Field Technician." However, the Employer contended at the hearing that Boyer was hired as and remains a "shop HVAC technician," as reflected in Corns testimony.[10] Moreover, Boyer is reflected in the Employer's organization charts initially as a "Technician TMH Facilities/Fleet Management," and beginning in December 9, 2002, and in later charts throughout 2003, as a "Materials Coordinator." It is reflected in the Regional Director's Report on Challenges and Objections that, "The Employer argues that Boyer is a technician apprentice." However, as set forth above, at the hearing counsel for the Employer disavowed any contention that Boyer was an apprentice.

Thus, in the Excelsior list the Employer represented Boyer as an HVAC field technician, although the employer argued at the hearing through testimony that Boyer was hired as and remains and HVAC shop technician. Moreover, in the post election proceedings the Employer represented to the Regional Director that Boyer was an apprentice technician.[11] Clearly, based on testimony and documentary evidence the employer was aware that its HVAC journeymen and apprentice service technicians referenced in the bargaining unit applied solely to its HVAC field technicians, which is why the Employer attempted to miscast Boyer as an HVAC field Technician in its Excelsior list, and later as an apprentice technician in its position to the Regional Director concerning these post-election proceedings. However, the Employer failed to contend that Boyer was in either category at the hearing or in its post hearing brief, despite its

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years, an apprentice license, and during that period shall have completed at least 1,875 hours of training in providing heating, ventilation, air-conditioning, and refrigeration services under the direction and control of a licensed contractor; and (2) pass an examination administered by the Board.

The Union argues that Boyer is not licensed under Maryland law and therefore he cannot perform even limited work in assisting HVAC mechanics, and the National Labor Relations Board must not sanction a violation of Maryland law by including Boyer in a unit of employees performing work which he is not lawfully permitted to perform. The Employer argues that Boyer holds a Universal Refrigerant license, which it contends arguably satisfies the Maryland's licensing requirements to perform HVAC work, therefore the Maryland statute does not exclude Boyer from the stipulated unit. I disagree with the Union's contention that the National Labor Relations Board's placement of Boyer in the bargaining unit would sanction a violation of Maryland state law. The mere placement of an individual in a bargaining unit work does not require that the employee perform any specific work. However, I note the Employer has provided no citation to the Maryland code to establish that Boyer's Universal Refrigerant license was issued by the Maryland State Board so as to satisfy state code requirements for him to perform HVAC work. Even assuming the Employer could establish that Boyer is entitled to perform some of this work under state law, Boyer conceded he has not applied for an Maryland state apprentice license, and Boyer's testimony reveals that he is not in training to be a journeyman. Thus, under the Maryland State code, Boyer meets neither the state's requirements to be an HVAC journeyman or apprentice service technician.

[10] See also the Employer's brief at page 28.

[11] The Employer made no objection to the admission to the Regional Director's Report on Challenges and Objections into evidence, nor was there any claim that the representations made therein about the Employer's positions were inaccurate.

prior representations. I find the Employer's shifting positions undermines any contention that it was not the parties' intent to exclude Boyer from the stipulated unit.[12]

Finally, I find that Boyer does not share a community of interest with the unit of skilled HVAC service technicians. Boyer wears the same uniform, fills out the same time sheets, and receives the same benefit package as the unit employees. Boyer also attends safety meetings, which are attended by the HVAC service technicians. However, the main functions of the HVAC service technicians are to service, diagnose, repair, remove and install HVAC units. They are journeymen technicians licensed by the state, and the remainder of the unit is composed of licensed apprentices working toward their journeyman status through on the job training, and attending trade schools. The Employer's HVAC apprentices starting pay rate is around $2 an hour more than Boyer was earning after 3 years of service, and the HVAC journeymen technicians can earn as much as $10 more an hour than the apprentices. The HVAC service technicians are given a van to drive to the sites and drive home at night. The do not report to the Employer's facility to receive the assignments. Rather they call in on a daily basis for their assignments, and then report to the jobsites. Boyer, while holding a universal refrigerant license, is not an apprentice, nor is he being trained to be a journeymen technician. He performs maintenance work at the Employer's facility, keeps track of the service technicians' tools, performs repairs on the tools, and on the Employer's vehicles. Boyer drives a large flat truck to the jobsites where he makes deliveries of large equipment. He will assist crane operators, who are employed by outside contractors, in preparing equipment to be lifted by the cranes. Boyer assists the HVAC service technicians in loading and unloading equipment, and with the installation of equipment on occasion when his deliveries bring him to a particular site, and he sometimes perform some of the work at the sites that a technician performs. Boyer testified that when he is at the sites he functions more in the capacity of a laborer than a service technician. He distinguished himself from the apprentices stating they are receiving on the job training to become journeymen, while Boyer is not in that program. Boyer testified he is both in the service department and administration. During time periods when the HVAC service technicians were broken into two teams, Boyer was not on either of the teams.

I find the HVAC service technicians share a separate community of interest from Boyer, and they constitute an appropriate bargaining unit. The service technicians are highly skilled individuals, licensed by the state as journeyman or apprentices training to be journeyman, and they go through a lengthy apprenticeship program to obtain journeymen status. They are paid at a higher level than Boyer at the apprenticeship level, and receive significantly higher pay as they progress to journeymen status. While they will on occasion perform some of Boyer's work in his absence this is on an infrequent basis. Similarly, while Boyer will assist them on occasion at the jobsite, he functions more in a laborer's capacity, and he is not being trained to increase his skills to become a journeyman. See, *United Operations, Inc.,* 338 NLRB No. 18 (2002), where the Board held that an employer's HVAC technicians were a functionally distinct group of highly skilled and licensed employees, with common interests distinguishable from the Employer's other field service employees. There was no contention in *United Operations* that the HVAC technicians there had to go through apprenticeship training as they do here, yet the

[12] Any contention that the Employer did not understand the nature of the stipulation is further undermined by its opening statement at the hearing where its is argued that Liebau and Savage should be in the unit because, "They are journeymen technicians. They hold journeymen licenses."(Tr. 14). I also conclude that as a large HVAC contractor located in the state of Maryland the Employer was keenly aware of the state's definition for journeyman and apprentice technicians at the time it entered the stipulation with the Union, and that Boyer did not qualify in either category.

Board majority reversed the Regional Director and concluded they shared a separate community of interest and should be in a separate bargaining unit.[13]

In sum, I find that the stipulation is clear on its face that the unit is limited to HVAC journeymen and apprentice service technicians, and that Boyer is in neither classification. I find that extrinsic evidence also supports the conclusion that it was the parties' intent to exclude Boyer from the unit. Finally, should the Board find it necessary to reach the third prong of its test; I find that the HVAC journeymen and apprentice service technicians share a separate community of interest from Boyer. For all of these reasons, I recommend that the challenge to Boyer's ballot be sustained, and that he be excluded from the bargaining unit.

2. Savage and Liebau

a. Legal principles

The burden of proving that an individual is a statutory supervisor rests with the party asserting it. See, *NLRB v. Kentucky River Community Care,* 121 S.Ct. 1861(2001). Section 2(11) of the Act defines "supervisor" as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *NLRB v. Kentucky River Community Care*, supra., at 1867 the Court stated Section 2(11) of the Act:

> …sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'In the interest of the employer.' *NLRB v. Health Care & Retirement Corp. of America,* 511 U.S. 571, 574, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994).

1. Savage

Corns testified Savage has worked for the Employer as a HVAC field technician for around 27 years. On December 5, 2000, Savage was promoted from the position of senior technician to lead technician, and given a three dollar an hour increase. In September 2002, the Employer's organization chart lists Savage as an area manager with a team of eight technicians reporting to him. In organization charts dated December 9, 2002, March 7, May 1,

[13] See also *Dick Kelchner Excavating Co.,* 236 NLRB 1414, 1415 (1978); and *The Dahl Oil Co.,* 221 NLRB 1311 (1975). I do not find the Union's challenge to Boyer being based on the assertion that he is a truck driver impacts on his exclusion from the unit. There is no showing the Union would have been privy to the Employer's internal documents as to any specific job title given to Boyer, and Boyer does spend a substantial portion of his time driving a truck. Moreover, whatever title Boyer is given, there is no contention by either party that he is either a journeyman or apprentice HVAC technician.

and July 1, 2003, Savage is listed as an area service manager (ASM), with a team of around eight technicians reporting to him in each chart. Corns testified Savage held the ASM position in 2003.[14] The Employer's job description for ASM provides, among other things, that: they direct service projects or a multitude of service projects; function as the primary interface between the customers, vendors, sub-contractors, and provide internal expertise within the office and project administration. The job description states the ASM schedules personnel, materials, sub-contractors and equipment based on project needs, skill sets and availability; makes recommendations for hiring/terminating staff to the service managers; and conducts performance appraisals in concert with service supervisory personnel to recommend raises, promotions, training, and disciplinary actions. The job description states under supervisory responsibilities the ASM's responsibilities include "interviewing, and training employees; planning, assigning, and directing work; appraising performance; and rewarding and disciplining employees; addressing complaints;" … "and resolving problems."

Corns and Creager testified that Savage hurt his foot around May or June 2003 and at that time Savage began working in the office to help with dispatching. Corns testified Savage came into the office because of his injury and because the dispatching was in disarray. Corns testified the dispatcher evaluates the job as to which technician should be assigned there and what tools are needed. In addition to Savage, two office employees also performed some dispatch work. Similarly, Creager testified they brought Savage inside when he hurt his foot because they had a heavy burden due to office transformation. Creager testified they used Savage's computer and technical skills to organize the office. Creager testified he also had Savage go out and "assist some technicians with his cast on, to supervise them, in a sense that he knew the technical part, but he couldn't do it because of the cast." Creager testified Savage had surgery on his foot around October or November 2003. At the time of the January 2004 hearing, Savage was still working in the office.

Creager testified the ASM assists Creager in making sure the technicians get the right jobs to meet the customer's needs. Creager testified, "That's the biggest thing we have to accomplish, because we have so many contracts that we're working with and obligations that we have to meet, that I have to make sure that we are on the time frames we're supposed to be there." Creager testified that the Employer's facility runs as many as 180 to 200 jobs a month. Creager further testified concerning Savage as follows:

> Q. Did you ever have a conversation with technicians as to Savage's changing job responsibilities after his surgery in the fall of 2003?
> A. We had some conversations, but I think it was prior to the surgery, not after the surgery. And the reason for that is we went to centralized dispatching, because I felt that a technical person could help us out more in dispatching, getting the right people or the right technicians, the right tools, the right job.
> Q. And he did that based upon his technical expertise or some other expertise?
> A. Well, he's got multiple expertise. He's not also technical, but he's very computer savvy.

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[14] Creager when asked if he had ever told any technicians that Savage was their manager or supervisor, testified that, "I might have insinuated that he acts as the ASM…". Creager then tried to back away from this purposefully ambiguous statement. I have credited Corns testimony along with the Employer's organization charts, and Union witness Purdue over Creager's testimony, and find that Savage was an ASM in 2003 prior to the September 18 election.

Creager went on to testify:

> A. I have one person whose primary job is dispatching, which I have that, and I have also the people that their responsibility is more so for billing, invoicing, or warranties.
> JUDGE FINE: Whose primary job is dispatching?
> THE WITNESS: Mr. Savage.

Creager testified if Savage is out, Creager, Amig, or any of the office staff would fill in for his dispatching duties. Creager testified the field technicians are no longer broken into two teams "because we went to one dispatcher. We only have one coordinator."

Perdue's credited testimony reveals the following: During a meeting at the Employer prior to Purdue's September 11 separation date, Purdue was informed that, in addition to Creager, there were other levels of management in the Service department, including Amig and Savage and that Amig and Savage shared the ASM title. During a meeting with HVAC service technicians, Creager instructed them to call Savage for their assignments. The HVAC service technicians were told to call Savage by 1:30 p.m. to see where they should report the next day. Unlike the bargaining unit employees, Savage works in the office and has a desk with a phone and laptop. Savage assigned Perdue's work, coordinated work with subcontractors, and obtained material for Perdue. When Perdue called in he asked to speak to Savage, if Savage was busy, Perdue left him a message, or he spoke to one of the office personnel to receive his assignment. Perdue only spoke to the other office staff when Savage could not handle the phone call.[15]

Corns testified Savage has sat in with Corns in the evaluation of some of the HVAC service technicians.[16] Corns testified that these meetings were confidential. Corns testified that Savage did not evaluate anyone is 2003. The HVAC service technicians 2003 evaluation meetings took place in December following the election. Savage name is listed as project manager on three work orders, dated May 22 and 23, and June 6, 2003. On July 21, 2003, a field service technician filed a written request to be considered for a technician position in the Employer's ICS department. Savage signed off on the request as the "manager/supervisor." The document was submitted to personnel on July 23, 2003.

a. Analysis

The Employer argues in its brief that Savage has never been a supervisor in title or in the statutory sense. It is asserted that Savage performed some ministerial duties in the office in

[15] I have credited Perdue as set forth above over Creager's testimony that dispatching became Savage primary job after the September 18 election. Creager's testimony as to the time was hazy and in response to a leading question. Moreover, Purdue's testimony as to the routine with Savage as dispatcher was in sufficient detail to warrant the conclusion that Savage had been operating as the Employer's primary dispatcher for a substantial period of time prior to Perdue's September 11 separation date.

[16] Corns testified that he has sought the input of several senior technicians for the evaluation of other technicians, including Holland, McCue, Goodwell, Savage, and Liebau. However, Savage and Liebau were the only individuals Corns named as sitting in on evaluation meetings with him along with the employee being evaluated. Corns testified Savage, as well as all the senior technicians, could recommend that Corns have disciplinary discussions with employees.

2003, as a light duty accommodation after he injured his leg in May or June 2003, and that he is only in the office on a temporary basis. The Employer argues that, Savage has remained a senior HVAC field technician and that, after his injury, Savage at most serves as a part time dispatcher and sometimes procures materials for other technicians. It asserts Savage is just one of several individuals including some secretaries who act as part time dispatchers.

I find that prior to the September 18, election Savage was and at the time of the hearing remained a supervisor within the meaning of Section 2(11) of the Act. Contrary to the Employer's contention that Savage is just a senior HVAC field technician, Savage records reveal that on December 5, 2000, Savage was promoted from senior to lead technician, and given a three dollar an hour pay raise as a result of the promotion. Moreover, Savage was listed as an area manager on the Employer's September 2002 organization chart with a team of 8 technicians reporting to him, and with subsequent organization charts dated December 9, 2002, March 7, May 1, and July 1, 2003, Savage was listed as an ASM with a team of about eight technicians reporting to him. In this regard, Employer witness and former Service Department Manager Corns testified that Savage was an ASM in 2003. Perdue also credibly testified that he was informed that Savage was part of the Employer's management team and was an ASM in 2003. Savage name is listed as project manager on work orders, dated May 22 and 23, and June 6, 2003. On July 21, 2003, Savage signed off on an employees job bid request as "manager/supervisor."

The Employer's job description for an ASM vests that individual with multiple supervisory functions, including directing multiple projects, scheduling personnel, directing and assigning work.[17] Savage began working in the Employer's office around May or June 2003. While Savage was injured at the time, Corns testified Savage began working in the office because the Employer's dispatching procedures were in disarray. Corns testified Savage was there to aid an office transformation and to get everyone up to speed. Corns testified the dispatcher evaluates the job, including the right technician to go to each job, and what tools are needed. Creager also testified they brought Savage in to work in the office because of problems attributed to office transformation. Creager testified they used Savage' computer and technical skills to organize the office, which was necessary due to a software change. Savage was still working in the office at the time of the January 2004 hearing.

Creager testified he had conversations with technicians concerning Savage's job responsibilities. Creager testified the reason for the conversations was the Employer went to centralized dispatching because Creager felt that a technical person could help out more in dispatching by getting the right technicians and the right tools to each job. Creager testified Savage was selected for the position because of both his computer skills and his technical expertise. Contrary to the Employer's contention that Savage is just a part time dispatcher, Creager testified that, "I have one person whose primary job is dispatching…'. Creager named Savage as that individual. Perdue's testimony reveals that, during a technicians' meeting, Creager stated they were to call Savage for their assignments. Savage assigned Perdue's work, coordinated the work with subcontractors, and obtained material for Perdue.

[17] The ASM job description also states the ASM makes recommendations for hiring and terminating staff, conducting performance appraisals with supervisory personnel to recommend raises, promotions and disciplinary actions, rewarding and disciplining employees, and addressing complaints and resolving problems. Corns testified that Savage had in fact sat in on some appraisal meetings, and that he could recommend employees be spoken to about disciplinary action.

Creager testified the ASM assists Creager in making sure the technicians get the right jobs to meet the customer's needs. Creager testified, "That's the biggest thing we have to accomplish, because we have so many contracts that we're working with and obligations that we have to meet, that I have to make sure that we are on the time frames we're supposed to be there." Creager testified that the Employer's facility runs as many as 180 to 200 jobs a month. During the period before the election, the Employer employed around 20 HVAC service technicians of varying skill levels and experience in that they were categorized as senior technicians, technicians, and apprentices, and the evidence reveals that the employees skill levels also varied within each category. It was for this reason that Creager and Corn's testimony reveals that the Employer selected Savage to perform the dispatching because the Employer concluded that it requires someone with a technical background to get the right technician and the right equipment to each job. The staffing of the jobs also varied as Perdue testified that he has worked jobs by himself, with other journeymen and with apprentices depending on the nature of the job. Perdue testified that he worked on one job that was staffed by around six service technicians.

Thus, I find that Savage is a supervisor within the meaning of Section 2(11) of the Act because he exercises independent judgment on the Employers behalf in the assignment and direction of employees in order to maximize the efficiency and ensure timely completion of each project. Savage performs this function for around 20 employees in a work force of varied skill levels in an environment where there are multiple projects of varying complexity running at a time. See, *Arlington Masonry Supply, Inc.,* 339 NLRB No. 99, slip op. at 2 (2003); and *Palagonia Bakery Company, Inc.,* 339 NLRB No. 74, JD. slip op. at 20 (2003).[18] I recommend that the challenge to Savage ballot be sustained and that he be excluded from the bargaining unit.

2. Liebau

Corns testified Liebau has been working for the Employer for over 30 years, is the most senior of any of the Baltimore HVAC service technicians and is the highest paid. Corns testified Liebau has worked with his tools in the field for the duration of his employment. By memo dated July 28, 1995, entitled, "Supervisors On Call Compensation," addressed to Liebau and two others it is stated, "In recognition of putting all supervisors on normal rotation for on call duty, I have elected to provide you with a yearly bonus of $1000 each in addition to any other on call pay or yearly bonuses that may be afforded you as supervisors." The memo went on to state, "In addition to the above, each of you will be equipped with portable cellular phones to hopefully limit some stress during our busiest time of the year and encourage better communication with the men in the field." On December 5, 2000, Corns and Liebau signed off on a payroll status change form for Savage, where Savage was promoted from senior technician to lead technician, and given a $3 an hour pay increase. On January 1, 2001, Liebau was given a pay increase of over $2 an hour for a promotion from field supervision to field foreman. On April 4, 2001, Liebau signed off as supervisor, and Corns signed off as the general manager on an employee counseling report for an employee for driving through a red light. On December 5, 2002, Corns and Liebau signed off on a payroll change form for a merit increase for senior technician Daniel Goodwell.

[18] I have concluded that Savage became an ASM prior to the September 2003 election, and note that job description of an ASM suggests that Savage had supervisory authority in other areas. While I have no reason to doubt that Savage was vested with the authority set forth in the job description, I do not find it necessary to reach this issue since I have concluded he is a statutory supervisor for the reasons set forth above.

In the Employer's organization chart issued in September 2002, Liebau is referred to as a senior team leader. He is listed separately from the Employer's two teams of HVAC service technicians listed on the chart. In a chart dated December 9, 2002, Liebau is listed as "technical service advisor (coach)." Again he is not included as a member of either team of technicians. In the charts dated March 7 and May 1, 2003, Liebau is listed as an ASM with a team of eight technicians reporting to him. On the March 7, chart, Liebau is also listed as "technical advisor (coach)." In an organization chart dated July 1, 2003, Liebau is listed as member of a team of 11 technicians reporting to ASM Amig. Liebau is separated from the other technicians on the team in the chart in that he is given the title of coach.

Corns testified Liebau's title at the time of the hearing was coach and that Liebau was a field supervisor prior to becoming a coach. Corns testified as field supervisor Liebau helped Corns evaluate the junior technicians in terms of their mechanical abilities. Liebau also performed hands on work with his tools on a daily basis. Corns testified that when Liebau was a field supervisor, he was Corns' eyes and ears as to what was going on in the field because Corns worked in the office.

Corns initially testified Liebau's title changed from field supervisor to coach around June or July 2003. However, Corns later testified Liebau's title was changed to coach around the summer of 2002, not in 2003. Corns testified Liebau was not demoted when his title changed to coach, he did not receive a pay cut, and no announcement of Liebau's title change was made to the employees. Corns testified Liebau's title changed because the Employer was going through an office transformation where they were getting away from one person looking over the field work and going to a system where they had two teams with ASM's.

Corns testified that as a coach Liebau is used to train the newer technicians, and some of the senior technicians who were moving from small to larger equipment. Liebau is also sent out in the field to assist other technicians, and he provides them assistance by phone. Corns testified that in 2003, in addition to being a coach Liebau was a senior service technician. As such, when the other techs did not need Liebau's assistance, Liebau made service calls performing the same work as the other technicians. Corns testified that, as coach, Liebau spends most of his time working in the field with his tools.

Corns testified Liebau does not discipline employees, but he could recommend to Corns, when Corns was service manager, to have a conversation with employees concerning disciplinary matters. Corns testified this never happened. Corns testified that any of the senior technicians had the right to come to management, and say that another technician is not doing something correctly. However, Corns testified Liebau was one of the Employer's best technicians, and that when he makes a recommendation Corns takes it seriously.

Creager replaced Corns as service manager on March 10, 2003. Creager testified Liebau was already classified as coach when Creager became the service manager. Creager retained Liebau as coach due to Liebau's technical skills on heavy equipment and because Liebau is a good resource for technical assistance for minimum range technicians. Creager testified that in July, August and September 2003, Liebau's responsibilities were handling service calls, doing rebuilds, and working with his tools day in and day out.

Perdue worked for the Employer for 3 years as an HVAC journeyman service technician until his employment ended on September 11, 2003. Perdue testified Liebau ran a service department meeting around October 2001. Liebau also provided technical assistance to the Employer's sales people in estimating projects, and on occasion Perdue assisted Liebau in this activity. Liebau provided support to the sales personnel on a more frequent basis than Perdue.

Liebau informed Perdue that Liebau had to go to the office to review paperwork and review oil samples. Perdue was not aware of other HVAC technicians performing these functions. Liebau visited Perdue's jobs around 10 times in the 3 years Perdue worked for the Employer to see how the jobs were progressing, and to see if Perdue needed any help or advice. One time when Liebau arrived he said Amig sent him. There were times Perdue received technical advice from Liebau by telephone. Perdue testified that, while he was at the jobsites, no other HVAC technicians visited and had the same type of conversation with Perdue that Liebau had. In the summer of 2002, Liebau came to Perdue's jobsite and gave Liebau a job description, which Liebau required Perdue sign for its receipt.

Perdue testified the Employer conducted annual reviews to determine wage increases. He testified he had two reviews while working for the Employer. Liebau attended one of the reviews, and Corns attended both of them. During the review Liebau attended, Corns asked Liebau how Perdue was progressing, and Liebau said he has been coming along very well. Perdue testified he was not aware of any other HVAC technicians sitting in on evaluations stating they were confidential. Liebau signed off on an annual performance evaluation of technician Dave Bollinger, dated October 9, 2002. Liebau signed off under the title of operations manager, and Corns signed off as service manager. Liebau signed off on technician Tom Holland's performance evaluation under the title service manager. Corns did not sign the evaluation, which Holland signed on October 4, 2002. Liebau signed off on 12 evaluations during this time period, and there were only four service technician evaluations that did not contain his signature.[19]

While Corns testified, at one point his testimony, that as coach Perdue no longer evaluated employees, when asked to explain why Liebau's signature appears on certain evaluations in 2002, Corns testified as follows:

> A. That position as coach, I asked his - -have him just to sit in and evaluate from a mechanical standpoint. I also asked Savage on a couple.

Corns testified that the evaluations are very confidential and that they go to human resources. Corns testified that while Liebau and Savage sat in on some evaluation meetings, they did not fill out the evaluations. Rather, Corns wrote the evaluations and Liebau and Savage signature attested to their presence at the meeting.

Perdue credibly testified to the following: The employer has a lock out/tag out program providing that if a technician was working on a machine, they were supposed to lock it out so it would not be returned to service. The technician who installs the lock was supposed to be the one to remove it. If the technician is not available, then a supervisor could remove the lock. In June 2003, there was an incident where Perdue was not available to remove his locking device and Liebau removed the lock. When Perdue brought the incident up to Creager, Creager said that a supervisor could remove the lock, and Liebau was a supervisor.[20]

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[19] The parties stipulated that the next set of written evaluations took place in December 2003, none of which contained Liebau's signature.

[20] Creager did not specifically testify about this incident, although he made a general denial of informing anyone that Liebau was a supervisor. Noting Creager's failure to address the incident in his testimony and considering the overall demeanor of the two witnesses, I have credited Perdue's specific testimony as to his conversation with Creager set forth above over Creager's general denial.

a. Analysis

The Employer argues at page 10 of his brief that:

> Trane freely admits that Liebau performed some additional duties and held a 'supervisor' title for a short period prior to 2003. Liebau, however, always remained classified as a Senior HVAC Technician and continued working with tools in the field at all times. In the Summer of 2002, Liebau was given the honorary, supplemental title of Coach, and relinquished his additional duties and the 'supervisor' title. As Coach, Liebau did exactly the same work as other Senior HVAC Field Technicians, including working with his tools in the field every day and sharing his 34 years of expertise with less experienced Technicians. Liebau had no supervisory responsibilities in 2003, and did not have the authority to engage in any of the 12 listed supervisory functions or to exercise independent judgment with respect to any such functions.[21]

I find that Liebau is a supervisor within the meaning of Section 2(11) of the Act. Contrary to the Employer's position in its brief that Liebau held a supervisory title for short period prior to 2003, the evidence reveals that by memo in July 1995, Liebau received a $1000 bonus, "In recognition of putting all supervisors on normal rotation for on call duty…". The memo went on to state that this was in addition to any "yearly bonuses that may be afforded you as supervisors." On December 5, 2000, Liebau, along with Service Manager Corns signed off on a payroll status change form for Savage, where Savage was promoted from senior technician to lead technician, and given a three dollar an hour increase. On January 1, 2001, Liebau was given a pay increase of over two dollars an hour for promotion from field supervisor to field foreman. On April 4, 2001, Liebau signed off as supervisor on employee counseling report. Liebau ran a service department meeting in October 2001.

In October 2002, Liebau attended the annual evaluation meetings of 12 of 16 field technicians, and Liebau signed off on the evaluations for the employees whose meetings he attended. Corns testified the evaluations are confidential and they are forwarded to human relations. Corns testified raises are based on merit and seniority. Perdue's testimony is undisputed that his raises were based on his evaluations. Liebau signed off on the line designated operations manager on technician Bollinger's October 2002 evaluation, and signed off on the line designated at service manager for technician Holland's October 2002 evaluation. Liebau was the only management representative to sign off on Holland's evaluation. Corns testified Liebau was Corns eyes and ears in the field because Corns was stationed in the office performing administrative work. Corns testified Liebau was one of the Employer's most experienced technicians and that when he made a recommendation Corns took it very seriously. On December 2, 2002, Liebau and Corns signed off on a merit increase for senior technician Goodwell. While Corns initially testified Liebau no longer participated in the evaluation of employees when he assumed the title of coach, Corns later testified that in fact Liebau assumed the title of Coach in 2002, and that Liebau did participate in the evaluation process after he assumed that title. Corns also testified Liebau was not demoted when he became coach, nor did he receive a decrease in pay. In June 2003, Liebau removed a lock from a piece of equipment Perdue was servicing. When Perdue asked Creager about it, he was told that a supervisor could remove the lock and Liebau was a supervisor.

On Employer organization charts issued in 2002 and 2003 Liebau was given various titles that differentiated him from the Employer's senior technicians. In a chart issued in

[21] Emphasis and transcript citations have been omitted from this quote.

September 2002, Liebau is referred to as a senior team leader, in a chart dated December 9, 2000, Liebau is referred to as technical advisor (coach). On a chart dated March 7, 2003, Liebau is listed both as "technical advisor (Coach)" and an ASM with a team of eight HVAC field technicians reporting to him. On a chart dated May 1, 2003, Liebau is listed as ASM with a team of 8 technicians reporting to him. On a chart dated July 1, 2003, Liebau is listed as "Coach."

Thus, Liebau's employment records and the Employer's organization charts continually list him as above the senior technicians in the Employer's employ. Liebau's records showed he received additional compensation based on his supervisory status, and this was not taken away from him when he was given the title of coach. Moreover, Corns testified, as coach, Liebau participated in the annual evaluation of employees, which directly impacted on their pay raises. The Employer employs senior technicians, technicians, and apprentices and the employees in each category are all of varying skill levels. Moreover, the apprentices in particular are judged on their skill sets as well as their education in determining their wage increases, and their elevation to journeymen status. As Corns testified, although Corns was a master technician, he had to rely on Liebau's input about the field work in order to evaluate employees because Corns did not spend sufficient time in the field. I therefore find Liebau makes effective recommendations as to the evaluation of employees, which directly impacts on their pay increases.[22]

In sum, Liebau received pay raises because of his supervisory status, participated in the evaluation of employees, signed off on employees' evaluations, as well as on certain promotions or wage increases. I find that he is closely aligned with management, and that he exercises independent judgment in the evaluation of employees, that he me makes effective recommendations pertaining to those evaluations which have a direct impact on the employees' promotion and their pay increases. Accordingly, I find that Liebau is a supervisor within the meaning of Section 2(11) of the Act, and recommend that the challenge to his ballot be sustained. See *El-Tech Research Corp.,* 300 NLRB 522, 522, 529 (1990), where Hambrick was found to be a supervisor noting that she was closely aligned with management, and had the authority to evaluate employees with the evaluations constituting effective recommendations for wage increases.

B. The Employer's Objection 1(a)

Corns testified the Employer has between 15 and 20 parking spaces where the word Trane is painted in large white print on the asphalt which are located in the front and to the right side of the Employer's facility. The spaces are for Employer customers and office staff. Corns testified on one occasion at around 6:30 to 7 a.m., Corns saw Union Organizer David Troll present on the parking lot spaces marked with Trane's name.[23] Troll was assembling employees in front of the building. Corns went out and asked Troll to leave. In response, Troll

[22] I do not credit Creager's testimony that Liebau no longer played a significant role in the evaluation process after Creager became service department manager. Creager is not a journeyman HVAC service technician and he also did not spend a significant time in the field. I find that Creager, as did Creager's predecessor, relies on Liebau's input for employee evaluations. I do not find Liebau's failure to sign off on any evaluations in December 2003 establishes he no longer participates in the evaluation process as these evaluations took place following the election when Liebau's ballot was challenged.

[23] Troll was sitting in the hearing room at the time of Corns' testimony and he was identified as the union organizer for the Maryland State Pipefitters Union.

asked Corns if the Employer owned the property. Corns explained they leased it, and any space with the name Trane on it was under the lease. After Corns' explanation those assembled moved. Corns testified as follows as to the timing of this incident:

Q. Do you remember what month it was?
A. I do not.
Q. Was it during the time in which management was giving pre-election speeches?
A. Yes.
Q. Okay. Do you know when the election was?
A. I don't remember the exact date.
Q. Okay. Was this before the election occurred?
A. It was.
Q. Okay. Was it after the petition was filed?
A. I believe it was.

Corns testified Troll came back a second time shortly after this incident. Troll held another meeting with the Employer's employees in the spaces marked for Trane. Corns asked Troll if he had forgotten their last conversation. Corns asked Troll to move and Troll and the employees moved beyond the parking spaces marked for Trane. This was also around 6:30 to 7 a.m. Troll had been there for around 30 to 45 minutes when Corns asked him to move. Corns testified he thought he had a right to chase them off of the parking spaces as safety officer and as one of the managers. Corns testified the parking lot is not fenced off and there are other tenants besides the Employer that occupy other buildings and offices on the property.

The Employer's lease provides, in pertinent part:

9. MANAGEMENT AND OPERATION OF COMMON AREAS. Landlord will operate and maintain, or will cause to be operated and maintained, the non-exclusive parking lot, driveways, open space ("Common Areas") in a manner deemed by Landlord to be reasonable and appropriate and in the best interests of the Property. Landlord will have the right (1) to establish, modify and enforce reasonable rules and regulations with respect to the Common Areas; (ii) to enter into modify and terminate easement and other agreements pertaining to the use and maintenance of the Common Areas: (iii) to close all or any portion of the Common Areas to such extent as may, in the opinion of Landlord, be necessary to prevent a dedication thereof or the accrual of any right to any person or to the public therein: (iv) to close temporarily any or all portions of the Common Areas; and (v) to do and perform such other acts in and to said areas and improvements as, in the exercise of good business judgment, Landlord shall determine to be advisable.

* * *

20. Landlord shall provide (30) on-site reserved parking spaces. Provided Landlord continues to own the adjacent Property, Landlord may offer alternative reserved spaces on the Days Inn Parking lot adjacent to tenant's Leased Premises. In either case, Landlord shall have no obligation to police or monitor said reserved spaces. Upon the first renewal option, Landlord shall provide six (6) additional reserved parking spaces under the same terms and conditions.

1. Analysis

It is well settled that during the post petition and pre election period known as the critical period, conduct that creates an atmosphere rendering improbable a free choice by employees

warrants invalidating an election. See *General Shoe Corp.,* 77 NLRB 124 (1948). The test for setting aside an election is an objective one, which considers the conduct's reasonable "tendency to interfere with employees' freedom of choice." *Hopkins Nursing Care Center,* 309 NLRB 958, 958 (1992).

In *Wild Oats Community Markets,* 336 NLRB 179, 180, (2001), the Board set forth the following principles:

> It is well established that an employer may properly prohibit solicitation/distribution by nonemployee union representatives on its property if reasonable efforts by the union through other available channels of communication will enable it to convey its message, and if the employer's prohibition does not discriminate against the union by permitting others to solicit/distribute. This precedent, however, presupposes that the employer at issue possesses a property interest entitling it to exclude other individuals from that property. Therefore, in situations involving a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with a denial of union access to its property must meet a threshold burden of establishing that it had, at the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the property. If it fails to do so, there is no actual conflict between private property rights and Section 7 rights, and the employer's actions therefore will be found violative of Section 8(a)(1) of the Act. In determining the character of an employer's property interest, the Board examines relevant record evidence-- including the language of a lease or other pertinent agreement--in conjunction with the law of the state in which the property is located. (Citations omitted.)

Concerning trespass, the Maryland State Annotated Code at Title 6, Section 403 (2004) provides that:

> (a) A person may not enter or cross over private property or board the boat or other marine vessel of another, after having been notified by the owner or the owner's agent not to do so, unless entering or crossing under a good faith claim of right or ownership.

The only objection at issue in this proceeding is the Employer's contention that the Union intimidated and coerced employees into voting for it by congregating in the Company's parking lot before and after each management/employee meeting during the critical period. Corns was the only witness to testify about this matter. It is undisputed through Corns' testimony that Union official Troll appeared, during the critical period, on two occasions in the parking lot of the Employer's facility and conducted meetings with groups of the Employer's employees in parking spaces designated for the Employer. On both occasions, Corns asked Troll to move, and pursuant to this request Troll and the employees moved without incident. Corns could not specify the dates of these incidents, and basically only responded to leading questions in testifying that the events occurred during the critical period. Moreover, Corns testified that Troll's two meetings with employees took place before the start of the work day, and there is no evidence whatsoever to sustain the Employer's assertion in its objection that the Union conducted these meetings "before and after each management/employee meeting during the post-petition, pre-election period" as the dates, times, and number of Employer meetings were not established on the record, nor was the proximity of Trolls' meetings to any of the Employer's meetings established.

The Employer has not established that it maintained a no-solicitation rule, and there was no evidence that Trolls conduct which took place before the start of the work day interfered with

the Employer's operations, prevented employees from parking, or that the employees' attendance at Troll's meetings was other than voluntary. Even assuming the Employer's lease vested the Employer with a property interest entitling it to exclude Troll as well as its employees from the marked parking spaces before the start of the work day, I do not find Troll's conduct was inflammatory or created an atmosphere rendering improbable a free choice by employees. Accordingly, I recommend that the Employer's Objection 1(a) be denied.[24]

CONCLUSIONS

Based on the forgoing, I recommend that the challenges to the ballots of John Boyer, Paul Savage, and Theodore Liebau be sustained, that the Employer's Objection 1(a) be denied and that this matter be remanded to the Regional Direction for the issuance of the appropriate Certification of Representative.

Within 14 days from the issuance of this decision, any party may file with the Board in Washington, DC, an original and seven copies of exceptions thereto. Immediately upon filing such exceptions the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 5. If no exceptions are filed, the Board will adopt the recommendations set forth herein.

Dated, Washington, D.C. , March 19, 2004.

Eric M. Fine
Administrative Law Judge

[24] Moreover, I find that the lease does not provide the Employer with a sufficient property interest to prevent its employees from meeting with Troll in the parking lot in spaces marked for Trane. The lease refers to the parking lot as a common area and item 9 of the lease renders the common areas within the exclusive control of the landlord. While item 20 of the lease designates certain parking spaces for the Employer, under that item the landlord is entitled to relocate those spaces. Moreover, item Article 9 of the lease provides the Landlord has the right to establish, modify and enforce reasonable rules relating to the Common Areas, and to modify and terminate easements and other agreements pertaining to the use and maintenance of the Common Areas. Thus, while the lease provides for a certain number of parking spaces for the Employer's use, the parking lot remains in control of the Landlord. I do not find Employer has established that Corns was the landlord's agent with authority on behalf of the landlord to evict Troll and the Employer's employees from the parking spaces at issue. See, *Wild Oats Community Markets,* supra.